1990

# State of Utah v. Rodney Donald Carter : Brief of Appellee

Utah Court of Appeals


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DOCKET NO. 900303CA

IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH, | : | |
| Plaintiff-Appellee, | : | Case No. 900303-CA |
| v. | : | |
| RODNEY DONALD CARTER, | : | Category No. 2 |
| Defendant-Appellant. | : | |

# BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DISTRIBUTE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(IV) (1990), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, THE HONORABLE MICHAEL R. MURPHY, PRESIDING.

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# BRIEF OF APPELLEE

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## JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for possession of a controlled substance with the intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (1990), in the Third Judicial District Court in and for Salt Lake County, the Honorable Michael R. Murphy, presiding. This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1990).

## STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

The sole issue on appeal is whether the trial court correctly denied defendant's motion to suppress evidence, ruling that defendant knowingly and voluntarily consented to the search of his person and luggage until police officers had reasonable and articulable suspicion that defendant was involved in a crime. Because of the trial court's advantageous position in determining the factual basis for a motion to suppress, this Court will not reverse the trial court's factual evaluation unless its findings

are clearly erroneous. State v. Johnson, 771 P.2d 326, 327 (Utah Ct. App.), cert. granted, ___ P.2d ___ (Utah 1989). However, in assessing the trial court's legal conclusions based upon its factual findings, this Court applies a correction of error standard. Id.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

**U.S. Const. Amend. IV:**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

Defendant, Rodney Carter, was charged with possession of a controlled substance with the intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (1990) (R. 6). Defendant filed a motion to suppress the evidence seized after a warrantless search of his person (R. 24). Upon the trial court's denial of defendant's motion, defendant entered a plea of not guilty. Defendant was convicted on March 20, 1990 after a bench trial and on May 6, 1990, was sentenced to a term of one to fifteen years in the Utah State Prison. The sentence was suspended in lieu of thirty-six months probation under the supervision of Adult Probation and Parole (R. 130, 142).

## STATEMENT OF THE FACTS[1]

On July 17, 1989 Detective Bart Palmer of the Salt Lake County Sheriff's Office and Lieutenant David Fullmer of the Utah State Narcotics Agency were observing airline passengers at the Salt Lake International Airport in an effort to locate drug couriers (transcript of October 18, 1989 deposition of Detective Palmer, page 1 [hereinafter "PT."]; transcript of October 18, 1989 deposition of Lieutenant Fullmer, page 1 [hereinafter "FT."]; and transcript of November 11, 1989 hearing on defendant's motion to suppress evidence, pages 36-37, 57 [hereinafter "Tr."]).[2]

At approximately 5:15 p.m. Palmer and Fullmer were both observing passengers as they deplaned from an America West flight originating in Los Angeles and arriving in Salt Lake City via Las Vegas (Tr. 4, 37, 67; PT. 1). Defendant Rodney Carter was among the passengers on that plane and was carrying a duffle bag (Tr. 7, 43; PT. 14-15). As defendant deplaned and entered the concourse, both officers noted that he scanned the area and crowd but did not appear to be looking for anyone in particular or reading the signs for directions (Tr. 38; PT. 1; FT. 1). Defendant then turned and walked up the concourse, past a bank of pay telephones (Tr. 41). As defendant walked up the concourse,

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[1] Although the State will summarize the facts as attested to by the testimonies of all witnesses, defendant does not challenge any of the trial court's findings of fact, in which, inter alia, the court found the police officers' testimonies more credible than defendant's testimony.

[2] The transcribed depositions of Fullmer and Palmer were made part of the record by stipulation (Tr. 3; R. 122).

he looked back over his shoulder in the direction of the officers three times (Tr. 38-39; PT. 1; FT. 1). Both Fullmer and Palmer decided to continue observing defendant, but they briefly lost visual contact with him as he rounded a turn (Tr. 39).

Defendant then went to a bank of pay telephones at the top of the concourse. Fullmer walked past defendant toward an escalator, and Palmer went to the telephone cubicle next to defendant (Tr. 39, 67-68; PT. 1-2; FT. 2-3). Defendant was in the telephone area only momentarily, and neither officer could hear him speak to anyone (Tr. 40, 68; PT. 10-11). Defendant apparently tried unsuccessfully to call his wife (Tr. 6, 40, 69).

After hanging up the phone, defendant walked to the terminal escalator leading to the lower level (Tr. 7, 40; PT. 2; FT. 4). Once defendant was on the escalator, he quickened his pace and began to rapidly walk past other people (Tr. 40; PT. 2; FT. 4). Defendant continued to walk at a fast pace and quickly exited the terminal without stopping by the baggage claim area (Id.). Palmer had to run in order to keep pace with defendant, who exited the terminal and went to the taxi cab stand just outside the main terminal doors (Tr. 7, 40, 42; PT. 2). Palmer and Fullmer conferred briefly as they approached the terminal doors and determined that they wanted to "contact" defendant before he left the premises (FT. 5-7).[3] Fullmer went out the northern doors of the terminal, and Palmer went out the doors

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[3] Fullmer explained at the hearing that when an individual is "contacted," the officer merely asks "permission to discuss things with the individual, and they have to agree" before the officer continues the discussion (Tr. 92).

through which defendant had exited (FT. 6).

Palmer approached defendant as he was preparing to board a taxi, identified himself as a police officer and asked defendant if he "would mind talking" to him for a moment (Tr. 44, 98; PT. 2, 17, 18). Defendant responded, "[s]ure," and removed his bag from the back seat of the taxi (Tr. 8-9, 44). Palmer asked defendant if he could see his plane ticket (Tr. 9-10; PT. 2, 19). Defendant responded that he thought he had left his ticket on the airplane but looked in his carry-on bag and produced an old America West ticket dated July 15, 1989 (Tr. 10, 43; PT. 2, 19-20). Defendant handed the ticket to Palmer, who, after noting it was under the name "Warren Carter," handed it back to defendant (Tr. 52; PT. 2, 19-20).

At about that point, Fullmer arrived near the scene and could see Palmer and defendant standing near the open back door of the taxi cab (Tr. 69; FT. 7). As Fullmer approached, the two stepped away from the cab, and Palmer asked defendant if he had any identification. Defendant responded that he did not, and Palmer asked him to look in his bag to see if he had anything with his name on it (Tr. 43, 52, 69-70, 85; FT. 8-9; PT. 2, 20). Defendant then turned and put his bag on a bench that was adjacent to the cab stand (Tr. 46, 70, 85-86; FT. 10; PT. 2, 20).

As defendant bent over his bag to look through it, Fullmer noted that there was a "line" protruding through defendant's shirt (Tr. 70-1, 86; FT. 10). The line was above defendant's waist and spanned across his back (Id.). Although Fullmer testified that he "definitely didn't know exactly what it

was," he was concerned that the line was tape which he had seen used on numerous occasions to strap narcotics to people's midsections (Id.).

Palmer then told defendant that he was a narcotics agent and asked defendant if he was carrying any drugs. Defendant responded that he was not (Tr. 9, 98-99; PT. 2, 21). Palmer then asked defendant if he could search his bag, and defendant indicated that he could (Tr. 9, 26, 45-6, 71, 88-9; FT. 10-11; PT. 2-3, 22). Palmer told the defendant that "it was strictly up to him," and that the defendant did not have to let him search his bag (Tr. 46, 65, 72, 88; PT. 3, 22). Defendant responded, "[y]es, you can," and handed his bag to Palmer (Id. and Tr. 26).[4]

Palmer began to search defendant's bag. Fullmer testified that he then asked defendant if he "would mind" if Fullmer searched his person (Tr. 47, 64, 72; FT. 11; PT. 3). Defendant responded, "go ahead," and turned his back to Fullmer (Tr. 48, 72; FT. 11; PT. 3). Defendant testified, however, that Fullmer did not ask to search his person. According to defendant, Fullmer simply stated that he was going to search him, moved behind defendant and began a pat down search. Defendant further indicated that he did not say anything but just "went along with it" (Tr. 12-14, 27-8).

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[4] Although defendant testified that Palmer asked if he could search his bag and that he responded "Yes, you can," he also testified that he did not recall Palmer telling him that he did not have to allow him to search his bag (Tr. 26). Defendant further testified that Palmer "could have" told him, and that he was "not going to deny" that Palmer told him about his right to refuse consent (Id.).

Fullmer conducted a pat down search of defendant and detected two bulges in defendant's lower abdomen area which later proved to be packages containing approximately 453 grams of cocaine (Tr. 73, 78; FT. 11-13). According to Fullmer, after he completed the pat down search he pointed to defendant's abdomen where the bulges were and asked defendant what they were (Tr. 73-4; FT. 13). Defendant did not respond, and Fullmer then asked if he could see the bulges (Tr. 74; FT. 13). Fullmer testified that defendant again did not respond verbally, and both officers testified that defendant then raised his shirt and revealed masking tape strapped around his midsection (Tr. 46-7, 74-5; FT. 13-4; PT. 3).

Fullmer still could not see the bulges, and asked defendant the purpose of the tape (Tr. 75; FT. 14). Defendant responded that he had injured his ribs and had taped them (Tr. 15, 29, 75; FT. 14). The tape was well below defendant's ribs, started at his waistline and continued into his pants (Tr. 75; FT. 14-15; PT. 3). Fullmer testified that he then asked defendant if he could see the rest of the tape, and defendant responded that he could but said he would rather not do so in the public area of the terminal (Tr. 75; FT. 14-15). Fullmer said that their airport office was just inside the doors and suggested that they could go there if that was all right with defendant. Defendant said, "yes," and the three proceeded to the office (Tr. 75; FT. 15).

Palmer was just completing the search of defendant's bag when Fullmer informed him that they were going to the airport

office (Tr. 48). According to defendant, Palmer's search of his bag took only "[t]hree, four minutes. Something like that. Not long at all" (Tr. 10-11). Fullmer's pat down search of defendant was initiated almost immediately after Palmer began searching defendant's bag and was completed shortly before Palmer was finished (Tr. 48, 72).

Fullmer testified that, upon entering the airport office, he pointed to a seat and said to defendant "you can sit there if you like" (Tr. 77-8; FT. 17). According to both officers, defendant remained standing and said "you've got me, you might as well have this" (Tr. 77-8; FT. 17; PT. 24). Defendant then opened his pants to reveal the tape and two packages near his lower abdomen (Id.). Fullmer asked if there was cocaine in the packages, and defendant indicated that there was. Fullmer and defendant then removed the tape and packages. Fullmer tested the material and confirmed that it was cocaine (Tr. 78; FT. 17).

Defendant was arrested and informed of his rights pursuant to Miranda (Tr. 79; FT. 17; PT. 24). According to Fullmer and Palmer, defendant then told them that he thought they were police when he got off the plane, and that was why he kept looking back toward them (Tr. 50-1, 79; FT. 17; PT. 24).[5]

Defendant's testimony about how he was taken to the airport office differs somewhat from that of the officers. According to defendant, he simply did not respond to Fullmer's

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[5] Defendant testified that he made no such statement and that he did not know he was being followed until Palmer approached him near the taxi cab (Tr. 22-23).

requests to see the tape or bulges and never raised his shirt. He did, however, testify that he told Fullmer and Palmer that he had injured his ribs playing ball and had taped them. According to defendant's testimony, both officers laughed and told him they were going to their office. Defendant testified that once in the office Fullmer immediately grabbed his shirt and raised it to reveal the tape strapped to defendant's body (Tr. 14-15, 28-31). Defendant further testified that after the officers had seen the tape, Fullmer again asked what the bulge was and defendant said something to the effect of "[y]ou have got it," or "here it is," apparently in reference to the cocaine (Tr. 19, 31).

In denying defendant's motion to suppress the cocaine seized, the trial court issued detailed written findings of fact and conclusions of law. (A copy of the district court's Findings of Fact and Conclusions of Law is attached hereto as Addendum A). The trial court specifically found that "defendant freely and voluntarily consented to the police requests at least through the point of his voluntarily raising his shirt and disclosing to the police the masking tape that was bound around the trunk of his body" (R. 121). The court also found that the "tape was of the type not normally used for medical purposes and was located below the rib cage which was the area of injury indicated by defendant" (Id.). After noting that it had read transcripts of the officers' earlier depositions and had listened to the testimonies of both the officers and defendant, the trial court said it was "confident in crediting the testimony of the officers in this case" (R. 122).

The court concluded that "defendant freely and voluntarily consented to everything that went on, at least through the point of voluntarily raising his shirt and disclosing to the police what was around the trunk of his body" (R. 123). The court also specifically concluded that "the pat down search [of defendant] was a free and voluntary consensual search" (Id.). Finally, the court concluded that defendant's lack of identification under the circumstances and his having non-medical type tape strapped around his abdomen for purported rib injuries, "gave rise to a reasonable articulable suspicion that the defendant was involved in crime, and therefore, from that point forward, law enforcement personnel were able to or had a right to interfere with the defendant's liberty" (R. 123-24).

## SUMMARY OF ARGUMENT

The trial court properly denied defendant's motion to suppress because the defendant knowingly and voluntarily consented to the search of his person and luggage. Further, defendant voluntarily raised his shirt and revealed to officers that he had non-medical masking tape wrapped around his waist for purported rib injuries. Defendant's lack of identification under the circumstances combined with his having masking tape wrapped around his waist gave rise to reasonable suspicion of criminal activity and justified detention of defendant from that point forward. Moreover, defendant voluntarily produced the cocaine that was in his possession, and its subsequent seizure was legally justified.

## ARGUMENT

### POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED BY THE POLICE BECAUSE DEFENDANT VOLUNTARILY CONSENTED TO THE SEARCH THAT YIELDED CONTRABAND UNTIL THE POLICE HAD A REASONABLE ARTICULABLE SUSPICION THAT DEFENDANT WAS INVOLVED IN A CRIME, AT WHICH TIME THE POLICE HAD THE RIGHT TO INTERFERE WITH DEFENDANT'S LIBERTY.

Defendant argues that the trial court erred in denying his motion to suppress evidence. In reviewing the trial court's ruling, this Court applies the following standard:

> In considering the trial court's action in denying defendant's motion to suppress, we will not disturb its factual evaluation unless its findings are clearly erroneous. . . . The trial judge is in the best position to assess the credibility and accuracy of the witnesses' divergent testimonies. . . . However, in assessing the trial court's legal conclusions based upon its factual findings, we afford it no deference but apply a "correction of error" standard.

State v. Johnson, 771 P.2d 326, 327 (Utah Ct. App.), cert. granted, ___P.2d___ (Utah 1989) (citations omitted).

Defendant claims that his rights under the fourth and fourteenth amendments to the United States Constitution and article I, section 14 of the Utah Constitution were violated, arguing that the police did not have a reasonable and articulable suspicion to stop defendant and that defendant did not voluntarily consent to a search.[6]

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[6] Although defendant purports to base his claim on both federal and state constitutional grounds, he does not offer a specific independent state analysis. Rather, he merely makes a conclusory statement to the effect that "the Utah Supreme Court has abandoned 'tailgating' United States Supreme Court cases" and

It is well settled that police officers may approach citizens and initiate a consensual encounter, and, as long as there is no detention or seizure, no fourth amendment rights are implicated. Florida v. Royer, 460 U.S. 491, 498 (1983); State v. Deitman, 739 P.2d 616, (Utah 1987) State v. Trujillo, 739 P.2d 85, (Utah Ct. App. 1987). While defendant acknowledges that police officers may initiate consensual encounters, he asserts that "what began as a 'consensual' encounter in the instant case quickly escalated into a fourth amendment detention or seizure" (Br. of App. at 8). The facts of this case and applicable case law do not support that assertion, and defendant's claim should be rejected.

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[6] Cont. suggests that this Court's decision in State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988), should control this case (Br. of App. at 18 n.2).

A mere assertion that a state and federal analysis might differ, without any elaboration, does not constitute a reasoned analysis. Defendant's state constitutional analysis below was even more cursory than that presented in his brief. This Court, therefore, should address defendant's claim based only on federal constitutional provisions. See, e.g., State v. Julian, 771 P.2d 1061, 1062 n.1 (Utah 1989); State v. Marshall, 791 P.2d 880, 883 n.4 (Utah Ct. App.), petition for cert. filed, 135 Utah Adv. Rep. 78 (Utah 1990).

Even if this Court were to consider defendant's state constitutional claim, defendant's reliance on Sery for his broad assertion is misplaced. Sery was not decided under state constitutional provisions, but under federal constitutional provisions. Furthermore, the aspect of Sery which defendant appears to argue is applicable to this case was based at least in part on the Ninth Circuit Court of Appeals decision in United States v. Sokolow, 831 F.2d 1413 (9th Cir. 1987). See Sery, 758 P.2d at 943-44. The United States Supreme Court has since reversed the Ninth Circuit's decision in Sokolow. United States v. Sokolow, 109 S.Ct. 1581 (1989). Consequently, whether that portion of Sery upon which defendant seems to rely is still viable law is unclear.

Utah courts have recognized three levels of police encounters with the public:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will;
>
> (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop";
>
> (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)). See also State v. Johnson, 771 P.2d at 328; State v. Smith, 781 P.2d 879, 881 (Utah Ct. App. 1989). Defendant mischaracterizes his encounter with officers Fullmer and Palmer as a "level two encounter" requiring "articulable suspicion" when it was in fact a consensual encounter, at least until the point at which the officers and he moved to the airport office.[7] In making his

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[7] Defendant argues that even though he agreed to speak with Palmer, the encounter lost its consensual nature "when Palmer persisted in questioning him after he had been unable to produce his current ticket and had already provided a prior ticket" (Br. of App. at 11). Not only does defendant fail to cite any authority for this argument, but under level one consensual encounters, officers may "pose questions so long as the citizen is not detained against his will." Deitman, 739 P.2d at 617.

Defendant also argues that "[c]onsensual type encounters clearly lose their voluntary nature when police begin searching" and appears to claim that once Palmer began searching defendant's bag defendant was seized (Br. of App. at 11). Defendant again fails to cite any authority for his per se argument, and the state is aware of none. More importantly, defendant's argument is the product of an inappropriate intermingling of the questions

argument, defendant relies primarily on State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988), and Florida v. Royer, 460 U.S. 491 (1983). However, Sery and Royer are significantly different from the instant case.

In Sery, after the defendant refused to consent to a search of his bag, he was told he was free to leave, which he did. Detectives then gathered more information and again approached the defendant. When the defendant refused to submit his bag to a drug detection dog sniff, the officers detained him and seized his bag. The defendant was seized when he and his bag were taken back inside the airport terminal. This Court held that the officers lacked a reasonable suspicion to justify seizing and detaining defendant. Similarly, the defendant in Royer was seized when the detectives, without returning his ticket and driver's license, asked him to accompany them to a small room some 40 feet away. The seizure of the defendant was not justified because the detectives lacked reasonable suspicion that he was involved in criminal activity. In both Sery and Royer, the defendants' freedom of movement was clearly restricted by the actions of the officers even though the officers did not possess the requisite reasonable and articulable suspicion of criminal activity.

The instant case presents a situation very different from Sery and Royer because, as the trial court found, defendant

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[7] Cont. of whether consent was voluntary and whether defendant was seized; the two questions require distinct analysis. See, e.g., United States v. Maragh, 894 F.2d 415, 420 (D.C. Cir. 1990).

freely and voluntarily consented to everything that occurred, at least until he voluntarily raised his shirt (R. 123). Numerous courts, when faced with police-citizen encounters similar to the encounter in the instant case, have found that defendants were not seized and fourth amendment protections were not triggered. See, e.g., United States v. Maragh, 894 F.2d 415 (D.C. Cir. 1990) (holding that defendant was not seized for fourth amendment purposes during encounter at train station in which officer approached defendant without blocking his path, while another officer stood behind defendant, and officer identified himself as a narcotics officer, asked defendant if he had drugs in his bag, and defendant allowed officer to search bag); United States v. Poitier, 818 F.2d 679, 682 (8th Cir. 1987) (holding that more was required to turn consensual questioning of passenger at airport into level two encounter than display of badges, request for information and suggestion that the parties move to a nearby area out of the flow of traffic).

Moreover, defendant does not challenge any of the trial court's specific findings of fact, including the trial court's findings governing voluntary consent. For the purposes of legal analysis, the State and this Court must rely on the correctness of these findings of fact. Defendant, by rearguing his motion to suppress, is asking this Court to assume the trial bench and exercise a de novo review of the evidence presented at the hearing on that motion. That is not the function of the appellate process, and defendant's arguments must be rejected. Even if this Court were to exercise such a review, the law clearly supports the trial court's finding of voluntary consent.

As the United States Supreme Court said in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to [valid] consent." Id. at 219 (citations omitted). For consent to be valid it must be freely and voluntarily given. Id. at 222. This Court has likewise recognized the voluntary consent exception to fourth amendment requirements. See State v. Marshall, 791 P.2d 880, 887 (Utah Ct. App.), petition for cert. filed, 135 Utah Adv. Rep. 78 (Utah 1990); State v. Sierra, 754 P.2d 972, 980 (Utah Ct. App. 1988). To determine whether consent to search was voluntary, a totality of the circumstances test is applied to ensure that the consent was in fact voluntary and not the result of "duress or coercion, express or implied." Marshall, 791 P.2d at 887 (quoting Schneckloth, 412 U.S. at 227). The issue of whether a defendant voluntarily consented is a question of fact on which the state carries the burden of proof. United States v. Mendenhall, 446 U.S. 544, 557 (1980); Schneckloth, 412 U.S. at 222, 227. See also State v. Webb, 790 P.2d 65, 87 (Utah Ct. App. 1990). This Court deferentially reviews trial court's finding that defendant's consent was voluntarily given and will not reverse absent clear error. Webb, 790 P.2d at 87.

While this Court has made clear that the state has the burden of demonstrating voluntary consent, it has not clearly specified what standard of proof applies to that burden. In State v. Marshall, 791 P.2d at 887-88, and State v. Webb, 790

P.2d at 82, the Court appears to have adopted a clear and convincing standard of proof by embracing the standard espoused in United States v. Abbott, 546 F.2d 883 (10th Cir. 1976). Quoting Abbott, the Marshall Court set out the following standard which must be met by the state "to sustain its burden to show that voluntary consent was given":

> (1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

791 P.2d at 887-88 (quoting Abbott, 546 F.2d at 885 (quoting Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962)). This standard has been questioned by at least one other court as being an unduly strict standard of proof. United States v. Miller, 589 F.2d 1117, 1130-31 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979). Indeed, insofar as the Abbott standard imposes a clear and convincing standard of proof on the government, it is contrary to the clear majority view that the government need only prove voluntary consent to search by a preponderance of the evidence. See, e.g., United States v. Matlock, 415 U.S. 164, 177 n.14 (1974) (where, in reviewing the voluntariness of a consent to a warrantless search, the Court said the "controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence"); Bourjaily v. United States, 483 U.S. 171, 176 (1987) (citing Matlock for the principle that "voluntariness of consent to search must be shown

by a preponderance of the evidence"); United States v. Hurtado, 905 F.2d 74 (5th Cir. 1990); United States v. Chaidez, 906 F.2d 377 (8th Cir. 1990); White Fabricating Company v. United States, 903 F.2d 404 (6th Cir. 1990); People v. Harris, 557 N.E.2d 1277 (Ill. App. 1990); State v. Cross, 576 A.2d 1366 (Me. 1990); State v. O'Dell, 576 A.2d 425 (R.I. 1990); People v. Henderson, 220 Cal.App.3d 1632, 270 Cal.Rptr. 248 (1990).

While acceptance of the preponderance standard in this context is not universal, see 4 LaFave, Search and Seizure, § 11.2(c) at 236-37 (1987), the United States Supreme Court has made clear that that standard is appropriate, thus explaining the majority view. As the Fifth Circuit said in overruling its prior decisions that adopted a clear and convincing standard of proof:

> Since 1972, the Supreme Court has stated that the preponderance of evidence standard supplies the burden which the government must carry to defeat a defendant's motion to suppress evidence when the motion concerns the voluntariness of a confession, Lego v. Twomey, 404 U.S. 477, 482-89, 92 S.Ct. 619, 623-26, 30 L.Ed.2d 618 (1972), the voluntariness of a consent to a warrantless search, United States v. Matlock, 415 U.S. 164, 177 n. 14, 94 S.Ct. 988, 996 n. 14, 39 L.Ed.2d 242 (1974), the inevitable discovery of evidence, Nix v. Williams, 467 U.S. 431, 444 n. 5, 104 S.Ct. 2501, 2509 n. 5, 81 L.Ed.2d 377 (1984), or the waiver of Miranda rights, Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 523, 93 L.Ed.2d 473 (1986).
>
> In conformity with the rationale announced by the Supreme Court, we overrule our previous decisions requiring the government at a suppression hearing to prove voluntariness [of consent to search] by clear and convincing evidence. "[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." United States v. Matlock, 415 U.S. 164, 177 n. 14,

94 S.Ct. 988, 996 n. 14, 39 L.Ed.2d 242 (1974).

United States v. Hurtado, 905 F.2d at 76. In Lego v. Twomey, the Supreme Court explained its rationale for the preponderance standard:

> Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Our decision in Winship was not concerned with the standards for determining the admissibility of evidence or with the prosecution's burden of proof at a suppression hearing when evidence is challenged on constitutional grounds. Winship went no further than to confirm the fundamental right that protects "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364, 90 S.Ct., at 1072. . . . A guilty verdict is not rendered less reliable or less consonant with Winship simply because the admissibility of a confession is determined by a less stringent standard. . . .

404 U.S. at 486-87. The Court also rejected the argument that the admissibility of evidence challenged on constitutional grounds should be determined under a stricter standard of proof in order to protect the values that exclusionary rules are designed to protect:

> The argument is straightforward and has appeal. But we are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond a reasonable doubt. Evidence obtained in violation of the Fourth Amendment has been excluded from federal

> criminal trials for years. The same is true of coerced confessions offered in federal or state trials. But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. . . . Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries . . . . Sound reason for moving further in this direction has not been offered here nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by the police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.

404 U.S. at 488-89 (citations and footnote omitted). Although the Court said that "the States are free, pursuant to their own law, to adopt a higher standard[,] [in that] [t]hey may indeed differ as to the appropriate resolution of the values they find at stake," id. at 489, the rationale of Lego v. Twomey is sound and should provide the basis for this Court clearly specifying that the state need only prove voluntary consent to search by a preponderance of the evidence.

Defendant claims that his consent could not have been voluntary because it was not "unequivocal and specific" (Br. of App. at 23). As a brief review of the record will demonstrate, that assertion is utterly meritless.

Palmer identified himself as a narcotics officer before he asked defendant if he could search his bag. When defendant

responded that he could, Palmer emphasized that it was strictly up to defendant to allow him to search his bag (Tr. 46, 65, 72, 88; PT. 3, 22). Defendant again responded affirmatively and handed his bag to Palmer (Id. and Tr. 26). Just as Palmer began to search defendant's bag, Fullmer asked defendant if he could search his person. Defendant responded, "go ahead," and turned his back to Fullmer (Tr. 48, 72; FT. 11; PT. 3). The trial court found that defendant voluntarily raised his shirt to reveal the masking tape wrapped around the trunk of his body (R. 121, 123).

All of those events occurred in a public area of the airport, and only a few minutes elapsed. Neither officer asked defendant to move to an isolated area of the airport or to their office. Indeed, it was defendant who asked if they could move out of the public eye (Tr. 75; FT. 14-15). Fullmer suggested that their office was nearby, and defendant agreed that that location would be suitable (Tr. 75; PT 15). After the three entered the office, defendant volunteered that he was carrying narcotics and admitted that the packages strapped to his abdomen contained cocaine (Tr. 77-8; FT. 17; PT. 24). Defendant even assisted Fullmer in removing the tape and packages from his midsection (Tr. 77-8; FT. 17; PT.24).

The evidence clearly supports the trial court's finding of voluntary consent to search by a preponderance of the evidence. Even if this Court chooses to apply the stiffer Marshall standard, it is difficult to imagine how defendant's consent to search could have been more "unequivocal and specific". Moreover, defendant does not allege that his consent

was the product of duress or coercion. Therefore, discussion of the second prong of the Marshall analysis is unnecessary. Considering the totality of circumstances, there can be little doubt that defendant's consent was valid, at least through the point of his raising his shirt. See, e.g., Mendenhall, 446 U.S. at 555-60 (consent to search obtained after defendant had accompanied officers to an office away from the public eye and defendant had expressed concern that she would miss her plane was held valid); United States v. Bell, 892 F.2d 959, 965-66 (10th Cir. 1989) (finding consent valid under totality of circumstances with facts very similar to the instant case). See also State v. Webb, 790 P.2d at 82-3 (holding that even though defendant had already been arrested at time consent to search was given, under the totality of circumstances test consent was valid).

At the time defendant raised his shirt, the cumulative effect of three factors gave rise to a reasonable articulable suspicion that defendant was committing a crime: (1) defendant's lack of identification under the circumstances; (2) the fact that defendant indicated that the masking tape wrapped around his body was for rib injuries; and (3) the observation of the police officers that the tape was located below defendant's rib cage and was not of the type normally used for medical reasons (R. 123). All three factors were known to the officers before they accompanied defendant to the airport office. Consequently, even if the encounter between the officers and defendant escalated to a level two encounter when it was decided to move to an office inside the airport terminal, the officers were justified in

detaining defendant from that point forward. Deitman, 739 P.2d at 617-18. The record clearly supports the trial court's finding to that effect (R. 123-24).

Finally, defendant asserts that State v. Arroyo, 796 P.2d 684 (Utah 1990), is applicable to this case. Arroyo applies to those cases in which consent is given after there has been some police misconduct which might have tainted the validity of that consent. It is intended to prevent law enforcement officials from exploiting their prior illegalities to obtain consent. In the instant case, there was no illegality on the part of police before defendant consented to the search of his person and bag. Consequently, Arroyo does not apply to this case, and defendant's reliance on it is misplaced.

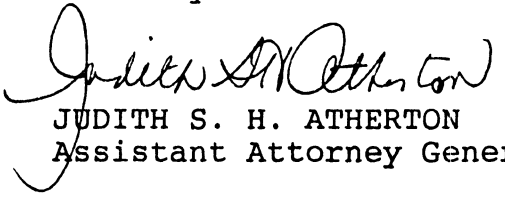
The encounter between police and defendant was consensual, at least until defendant raised his shirt to reveal the masking tape strapped around his body. From that point forward, the officers had a right to detain defendant. The trial court properly denied defendant's motion to suppress.

## CONCLUSION

For the foregoing reasons, defendant's conviction should be affirmed.

RESPECTFULLY submitted this 5 day of November, 1990.

R. PAUL VAN DAM
Attorney General



JUDITH S. H. ATHERTON
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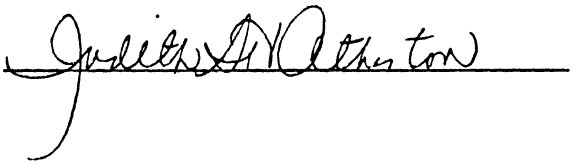
CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Ronald J. Yengich, Attorney for Appellant, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111, this 5 day of November, 1990.



ADDENDUM A

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH, Plaintiff, | ) | FINDINGS OF FACT AND CONCLUSIONS OF LAW |
| v. | ) | Case No. 891901201 |
| RODNEY DONALD CARTER, Defendant. | ) | Honorable Michael R. Murphy |

The above-entitled matter came on regularly for hearing before the Honorable Michael R. Murphy on the 11th day of December, 1989. The State of Utah was represented by its attorney, GREGORY M. WARNER, Deputy Salt Lake County Attorney, and the defendant was present and represented by his counsel, RONALD J. YENGICH, ESQUIRE. The Court having duly considered the evidence and testimony presented by the parties together with the party's argument thereon, now makes and enters the following:

## FINDINGS OF FACT

1. The defendant deplaned from an airline which the police considered to be from an area of origin where drugs were considered available.

2. As the defendant deplaned, he scanned the crowd.

3. As the defendant proceeded down the corridor, he looked back at least three times.

4. The defendant went to a phone bank which was not the first phone bank available, but was the second phone bank available.

5. As the defendant was at the phone bank, he looked away from the police officer who had gone to the telephone next to the one the defendant was using, and it is the Court's finding that the officers involved had no ability to actually perceive what the defendant was doing.

6. The defendant next proceeded toward the exit of the airport and walked fast down an ~~elevator~~ escalator rather than remaining stationary.

7. The defendant was carrying a type of a duffle bag which appeared to be empty.

8. The defendant did not have checked bags.

9. The defendant proceeded directly to a cab stand and hailed a cab.

10. The defendant approached the taxi. He had engaged the taxi, had placed his bag into the back seat and was contacted by an officer who told him he was a police officer, and asked the defendant if he would speak with him.

11. The defendant was asked to talk to the officer in a location approximately 20 feet from the taxi, at which point the officers began to ask the defendant questions.

12. The defendant was asked for identification by law enforcement personnel and the defendant was unable to produce identification.

13. The defendant's duffle bag was searched and an airline ticket used on a previous flight in the name of Warren Carter was revealed.

14. Officer Fullmer detected a line just at or above the defendant's waist but under his outer clothing, but was unable to determine what material caused such line on the defendant's clothing.

15. A pat down search was conducted by Officer Fullmer of the defendant and a bulge or bulges was found on the defendant at the time of such pat down.

16. The defendant lifted his shirt and exposed masking tape which extended down into his pants and which the defendant indicated to the law enforcement personnel was for medical purposes.

17. The defendant was returning from Nevada and had just a day or so before gone from Salt Lake to Las Vegas, which he demonstrated by the ticket stub that was produced by the defendant.

18. The defendant freely and voluntarily raised his shirt exposing the masking tape strapped around his body and the Court finds that the defendant freely and voluntarily consented to the police requests at least through the point of his voluntarily raising his shirt and disclosing to the police the masking tape that was bound around the trunk of his body. The tape was of the type not normally used for medical reasons.

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19. The Court's determination of the facts was not a matter of the Court perfunctorily accepting the testimony of the police officers. The Court listened to both officers testimony and the testimony of the defendant, and after further reading the Transcript in lieu of a preliminary hearing previously submitted by counsel for the purpose of the hearing, the Court feels confident in crediting the testimony of the officers in this case.

WHEREFORE, having heretofore entered its Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court specifically discredits the officers ability to form a reasonable articulate suspicion prior to the time of the defendant's failure to provide an identification upon request.

2. The Court concludes that the absence or the failure of the defendant to produce identification also was not by itself, or in the aggregate with the previously listed factors, sufficient to indicate a reasonable articulable suspicion.

3. The Court further concludes that the officer perception of a line just at or above the defendant's waist, but under his outer clothing, was not a reasonable articulable suspicion by itself or in combination with anything previously noted.

4. The Court further concludes that the pat down search and observations made by the officers, including the feeling

of the bulge, at that time was not sufficient to constitute a reasonable suspicion either alone or in the aggregate.

5. The Court gives no weight individually or in the aggregate to those factors other than the lack of identification in conjunction with the lifting of the defendant's shirt and his explanation as to the tape on his body.

6. The Court concludes, however, that the defendant freely and voluntarily consented to everything that went on, at least through the point of voluntarily raising his shirt and disclosing to the police what was around the trunk of his body and further that the pat down search was a free and voluntary consensual search.

7. The Court concludes that a combination of the defendant's lack of identification under the circumstances where he was at the airport returning from Nevada and had just a day or so gone from Salt Lake to Las Vegas, which was demonstrated voluntarily by the ticket stub that was produced by the defendant, and in combination with the defendant freely and voluntarily raising his shirt wherein the defendant stated that what was strapped around his body was merely for medical purposes, and the observation of the police at that time that the taping was other than what is normally used in medical settings, and the fact that the taping was below the rib cage, gave rise to reasonable articulable suspicion that the defendant was involved in crime, and

therefore, from that point forward, law enforcement personnel were able to or had a right to interfere with the defendant's liberty.

DATED this 9th day of January, 1990.

BY THE COURT:

HONORABLE MICHAEL R. MURPHY
Third District Court Judge

Approved as to Form:

Ronald J. Yengich

GMW/sc/0019